

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND SMITH,

Defendant-Appellant.

UNPUBLISHED

June 26, 2003

No. 234691

Kent Circuit Court

LC No. 00-004689-FC

Before: Smolenski, P.J., and Cooper and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree felony-murder, MCL 750.316(1)(b). He was sentenced as a third-felony habitual offender, MCL 769.11, to life imprisonment without parole. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion to suppress two statements given to Michigan detectives while he was in custody in Louisiana. We disagree. In reviewing whether there was a valid waiver of the right against self-incrimination and whether a confession was properly admitted, an appellate court conducts a de novo review of the entire record. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). The trial court's findings of fact are reviewed for clear error. *Id.*

When a defendant challenges the admissibility of a confession, the prosecution must prove by a preponderance of the evidence that there was a valid waiver of the right against self-incrimination. *Id.* at 634. A valid waiver must be voluntary and knowing and intelligent. *Id.* at 633. This is a bifurcated inquiry to be determined objectively upon the totality of the circumstances. *Id.* at 633-634. In this case, defendant only challenges the voluntariness aspect of his statements. A waiver of the right to remain silent is voluntary if it is "the product of a free and deliberate choice rather than [police] intimidation, coercion, or deception." *Id.* at 635, quoting *Colorado v Connelly*, 479 US 157, 170; 107 S Ct 515; 93 L Ed 2d 473 (1986).

In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an

unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Wells*, 238 Mich App 383, 387; 605 NW2d 374 (1999), quoting *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988)].

Where, as here, a defendant claims that a statement is involuntary because of police intimidation or coercion, he must show both misconduct and causation. See *Wells*, *supra* at 387-389. “Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.” *Id.* at 388, quoting *Connelly*, *supra* at 164.

In this case, while there was evidence that defendant had previously been physically abused by Louisiana police authorities, there were no allegations of abuse by the Michigan detectives who took defendant’s statements. Further, we conclude that the trial court properly found that there was no causal relationship between the earlier abuse by the Louisiana authorities and defendant’s subsequent statements to the Michigan detectives. As the trial court found, after defendant was mistreated in LaSalle Parish, Louisiana, he was transferred to Caldwell Parish and, by his own accounts, was treated well there for approximately a week before the Michigan officers arrived. Defendant was interrogated for approximately five hours on March 30, 2000, but did not confess at that time. However, when questioning resumed on March 31, 2000, he gave an incriminating statement almost immediately. In all, defendant was held for a total of twenty-nine days in Louisiana. He was arraigned a day or two after arriving at Caldwell Parish, approximately five days after his arrest, and before defendant gave his statements to the Michigan detectives.

The facts of this case present a lesser connection between the prior abuse and the later confession than the facts presented in *Wells*, *supra* at 389-390. Further, we are not persuaded that the length of defendant’s interrogation, the delay in initially bringing defendant before a magistrate, or the length of defendant’s detention rendered his confession involuntary. The trial court did not err in denying defendant’s motion to suppress. *Id.* at 390.

Defendant next argues that the trial court erred in granting the prosecutor’s pretrial motion to introduce evidence of other bad acts. We conclude that this issue is waived. The bad acts evidence was never introduced at trial pursuant to the parties’ stipulation. The stipulation stated that it would not be used, provided defendant refrained from claiming or arguing at trial that his statements to Michigan detectives were the result of coercion by the Louisiana police. Because the challenged evidence was never introduced at trial pursuant to defendant’s own stipulation, defendant has waived any error stemming from the trial court’s pretrial ruling to allow the evidence. See *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001). Further, we reject defendant’s claim that defense counsel was ineffective for entering into this stipulation. Counsel’s decision involved a classic matter of trial strategy, which this Court will not second-guess. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). The fact that the decision was prompted by a pretrial ruling that defendant maintains was incorrect does not remove it from the realm of trial strategy.

Defendant may not rely on hindsight to argue that counsel must have made the wrong choice. *LaVearn*, *supra* at 216.

Defendant next argues that there was insufficient evidence of malice to support his conviction of first-degree felony murder. We disagree. We evaluate the sufficiency of the evidence by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985).

Malice is defined as the intent to kill, to cause great bodily harm, or to do an act with wilful and wanton disregard of the likelihood that the natural tendency of one's actions will be to cause death or great bodily harm. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). As our Supreme Court observed, "[t]he intent to do an act in obvious disregard of life-endangering consequences is malice." *Id.* at 466. Although the *Goecke* Court declined to expressly decide whether this third form of malice is objective or subjective, *id.* at 464-465 and n 26, it quoted with approval from 2 LaFave & Scott, Substantive Criminal Law, § 7.4(b), p 205, as follows:

[M]ost depraved-heart murder cases do not require a determination of the issue of whether the defendant actually was aware of the risk entailed by his conduct; his conduct was very risky and he himself was reasonable enough to know it to be so. It is only the unusual case that raises the issue -- where the defendant is more absent minded, stupid or intoxicated than the reasonable man.

In the present case, the victim's badly charred body was found on a stairway landing. The victim had been bound with an electrical cord, and there was evidence that gasoline had been poured directly on her before she was set afire. Even if defendant's account of the events is believed, it is clear that he knew that gasoline was flammable because he threatened to pour same on the victim's dog and set it on fire. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rationale jury to find beyond a reasonable doubt that defendant acted with the requisite malice to support his felony murder conviction. See also *People v Djordjevic*, 230 Mich App 459, 462-463; 584 NW2d 610 (1998).

Lastly, defendant argues that the prosecutor committed misconduct by improperly eliciting evidence of a police officer's religious beliefs. Defendant did not preserve this issue with an appropriate objection to the challenged testimony at trial. See *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Accordingly, defendant must show a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Claims of prosecutorial misconduct are reviewed on a case by case basis to determine whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

MRE 610 provides:

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Similarly, a prosecutor may not appeal to the sympathies and emotions of the jurors, *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001), or inject issues that are broader than the defendant's guilt or innocence, *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999).

In this case, Officer Powe's testimony about his discussion of religion with defendant was not offered for the purpose of bolstering his credibility as a witness. Rather, it was offered for the purpose of explaining the circumstances surrounding defendant's confession, which is a relevant consideration at trial. See *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). Defendant's claim of error is without merit.

Affirmed.

/s/ Michael R. Smolenski
/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood